No. 89-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.
CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae. The written consents of all parties have been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of the petitioner before this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in

the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, all of EEAC's members, and the constituents of its trade association members, are subject to claims for punitive damages under a variety of federal and state laws and common law causes of action, including 42 U.S.C. § 1981, some state fair employment practices laws, and some state law tort actions arising out of the employment relationship. Moreover, Congress is presently considering legislation that would make punitive damages awardable in a much wider range of employment discrimination litigation.

Thus, several of the issues presented for review in this case are extremely important to the nationwide constituency which EEAC represents. The court below upheld a jury award of over $1,000,000 in punitive damages against Pacific Mutual on a theory of *respondeat superior* even though the jury was given virtually no guidance in assessing an appropriate award. Employers are particularly vulnerable to claims based on *respondeat superior* and their financial exposure under the various laws mentioned above will be greatly increased if this Court now holds that standardless jury awards of punitive damages are constitutional. Therefore, EEAC's members have a direct interest in the outcome of this case.

Because of its interest in issues involving damage awards under the nation's labor and employment laws, EEAC has participated as *amicus curiae* in several such cases, including *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977) (appropriateness of remedies); *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989) (scope of § 1981); *American Motor Sales*

Corp. v. Murphy, 570 F.2d 1227 (5th Cir. 1978) (punitive damages under ADEA); *Ford Motor Company v. EEOC*, 458 U.S. 219 (1982) (tolling of back pay liability under Title VII); *Rawson v. Sears Roebuck & Co.*, 822 F.2d 908 (10th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) (size of jury award in state law claim).

EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the insurance industry, and particularly in the field of employment litigation. Accordingly, this brief brings relevant matter to the attention of this Court that has not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondents are employees of Roosevelt City, a small Alabama community. Pet. App. B1.[1] Lemmie Ruffin was a soliciting agent for several insurance companies, including Petitioner Pacific Mutual and Union Fidelity, which is not a party to this case. Pet. App. A2. Ruffin contacted the City about providing insurance for its employees after its group health insurance policy was cancelled by another carrier. Pet. App. B1. He wrote the city a group life insurance policy with Pacific Mutual and a group health insurance policy with Union Fidelity. Pet. App. B2.

Ruffin used Pacific Mutual letterhead for correspondence on both policies, and all communications were handled through the Birmingham Pacific Mutual office. Pet. App. B2-B3. Insurance premiums were collected from the employees by payroll deduction and paid over to Ruffin, who pocketed them. *Id.* Both policies were

[1] Citations to the Petition for Certiorari and Petitioner's Appendix are designated as Pet. -- and Pet. App. — respectively.

cancelled for nonpayment of premium. *Id.* Respondent Cleopatra Haslip learned of the cancellation only after she had entered the hospital and incurred $2,500 in charges as well as additional medical bills that were turned over to a collection agency. *Id.* at B3.

Haslip and other participants sued Pacific Mutual and Ruffin for fraud. *Id.* Ruffin did not appear at the trial. Pet. 3. The jury awarded $1,040,000 to Haslip, $12,400 to Cynthia Craig, $15,290 to Alma Calhoun and $10,288 to Eddie Hargrove. Pet. App. B3. The trial court denied Pacific Mutual's motion for remittitur. Pet. App. A16. The Supreme Court of Alabama upheld the award. Pet. App. B1-B13. In particular, the Alabama court rejected Pacific Mutual's argument that the award was unconstitutional as a violation of due process. Pet. App. B12-B13. Justices Maddox and Steagall dissented in part, concluding that the punitive damages award violated Pacific Mutual's rights under the Fourteenth Amendment. Pet. App. B14-B16.

SUMMARY OF ARGUMENT

As various individual Justices of this Court have observed, unrestrained jury discretion to award punitive damages presents a significant issue under the Due Process Clause. Lacking any guidance as to the appropriate monetary range within which to set an award, juries are left to wander blindly amid concepts of punishment and deterrence, groping in the dark for a suitable amount. Such standardless discretion offers a defendant no warning of its potential liability, and no Constitutional safeguards, even though punitive damages are "quasi-criminal" in nature.

Standardless jury discretion to award punitive damages is of substantial concern to employers. Punitive damages are available in employment-related claims under federal and state laws such as Section 1981, 42 U.S.C. § 1981, state fair employment practice statutes,

and various state tort laws that have been put to use in employment cases. In addition, pending legislation in Congress would add punitive damages to the existing panoply of remedies available under Title VII of the Civil Rights Act of 1964. Juries have awarded exorbitant sums as punitive damages in employment-related claims. As shown by the instant case, judicial authority to modify such awards cannot be relied upon to block such abuses.

Moreover, unrestricted punitive damages awards are antithetical to the remedial and conciliatory goals of federal labor and employment laws. Legislation such as Title VII and the forerunner of its remedial provisions, the National Labor Relations Act, seeks not to "punish" employers but merely to make individuals whole through equitable remedies such as reinstatement and back pay. A primary goal of Title VII is the resolution of differences through conciliation rather than litigation. By holding out the hope of a large dollar jury award, the availability of unrestricted punitive damages operates as a serious disincentive to conciliation.

Further, the continued escalation of unrestrained punitive damages awards poses a serious threat to employers' ability to manage employees, and eventually to the competitiveness of American businesses in the international marketplace. Faced with the possibility that a jury's whim will result in an exorbitant award, employers will be inclined to retain poor performers rather than risk costly termination litigation. Exorbitant punitive damages awards can only increase the costs of goods and services, reduce efficiency in the marketplace, threaten the very existence of some businesses, and eventually eliminate jobs.

In addition, the court below authorized the imposition of a punitive damages award against an employer solely on the basis of the doctrine of *respondeat superior*. In the employment law context, use of *respondeat superior* to support a punitive award is particularly inappropri-

ate, since employers can be held liable for the discriminatory acts of their employees even though the employer took reasonable steps to prevent such conduct. Even if punitive damages can be awarded under the doctrine in employment law cases, jury discretion should be limited by instructions that employer efforts to prevent discrimination are a mitigating factor.

ARGUMENT

I. STANDARDLESS JURY DISCRETION TO AWARD PUNITIVE DAMAGES VIOLATES DUE PROCESS

A. Individual Justices of this Court Have Expressed Well-Founded Due Process Concerns over Unlimited Jury Discretion To Award Punitive Damages

In Justice O'Connor's words, "[a]wards of punitive damages are skyrocketing." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2924 (1989) (O'Connor, J., concurring in part and dissenting in part). A rarity no more than thirty years ago, punitive damages have now become routine, and there have been at least six awards in excess of $20 million since the Court's decision in *Browning-Ferris* last year. L. Gordon Crovitz, *Absurd Punitive Damages Also 'Mock' Due Process*, Wall Street Journal, March 14, 1990, at A19.

Juries frequently receive little or no guidance as to the appropriate size of a punitive damages award. "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). As punitive damages awards escalate, the question arises whether these awards can withstand scrutiny under the Due Process Clause of the Fourteenth Amendment, U.S. Const. Amend. XIV, § 1, which "prohibits any state deprivation

of life, liberty or property without due process of law." *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

The groundwork for this challenge was laid in two prior cases in which the Court considered, but did not decide, the issue. *Browning-Ferris, supra*, involved a challenge to the sheer size of a jury's $6 million punitive damages award in an antitrust case. The majority of the Court found that applicability of the Due Process Clause was not properly before the Court, and thus did not rule on that issue. *Id.* at 2921.[2] Justices Brennan and Marshall, while concurring with the Court's opinion upholding the award, did so with the understanding that the majority had not foreclosed a subsequent holding that the Due Process Clause restricts punitive damages in private civil cases.

Observing that prior Supreme Court decisions had "indicate[d] that . . . the Due Process Clause forbids damages awards that are 'grossly excessive' . . . or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable,'" *id.* at 2923 (Brennan, J., concurring) (citations omitted), Justice Brennan pinpointed the inherent problem in allowing punitive damage awards without any restrictions or guidance. "Without statutory (or at least common law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." *Id.* Justice Brennan noted that "'[t]he touchstone of due process is protection of the individual against arbitrary action of government,'" *id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986), quoting *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)) and warned:

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[2] The case was decided on the basis that the Excessive Fines Clause of the Eighth Amendment is inapplicable to punitive damages awards in cases between private parties.

> I for one would look longer and harder at an award of punitive damages based on such skeletal guidance [as a jury instruction on punitive damages that stated only to take into account the character of the defendants, their financial standing and the nature of their acts] than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.

Id.

Justice O'Connor expressed similar concerns in her concurring and dissenting opinion in which she was joined by Justice Stevens. Noting as had Justice Brennan that the issue remained open, Justice O'Connor recalled an earlier opinion in which she had commented upon "the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." *Browning-Ferris, supra,* at 2924 (O'Connor, J., concurring in part and disssenting in part) (recalling *Bankers Life and Casualty Company v. Crenshaw,* 486 U.S. 71 (1988)).

In *Bankers Life and Casualty Company v. Crenshaw,* 486 U.S. 71 (1988), the Court did not reach claims that a $1,600,000 punitive damages verdict for an insurer's bad faith refusal to pay a claim violated the Excess Fines, Due Process and Contract Clauses. Instead, the Court held only that the state penalty statute under which the damages were awarded did not violate the Equal Protection Clause. In her concurring opinion, Justice O'Connor agreed with the majority that the Court should not decide the Due Process issue, but expressed a strong view that a punitive damages award could be struck down in an appropriate case as violative of the Due Process Clause.

Justice O'Connor scrutinized a Mississippi law that allows a jury to award unlimited punitive damages for any common law tort if it finds that the defendant has acted willfully or intentionally, or with gross and reckless negligence. She explained that, "In my view, because

of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause." *Id.* at 87.

As did Justice Brennan's concerns in *Browning-Ferris,* Justice O'Connor's apprehensions centered upon the lack of any criteria to guide the jury as to what amount, if any, might appropriately be awarded as punitive damages. "Punitive damages are awarded not to compensate for injury, but, rather, 'to punish reprehensible conduct and to deter its future occurrence,'" Justice O'Connor explained. *Id.,* (quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974)). "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, 'the impact of these windfall recoveries is unpredictable and potentially substantial.'" *Id.* (quoting *International Brotherhood of Electrical Workers v. Foust,* 422 U.S. 42, 50 (1979)).

Justice O'Connor criticized the lack of specificity in the Mississippi law, stating that while it "may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate." *Id.* at 1656. Accordingly, Justice O'Connor concluded, "this grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Id.*

B. The "Unbridled Discretion" Allowed to the Jury in this Case To Award Punitive Damages Violates Due Process

The instant case raises precisely the same issues noted by Justices Brennan and O'Connor in *Browning-Ferris* and *Bankers' Life.* Here, the jury was instructed, "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." Pet. 15-16 (quoting RT 898). Such "guidance," as Justice Brennan observed in

Browning-Ferris, "is scarcely better than no guidance at all, [and] . . . reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Browning-Ferris, supra* at 2923 (Brennan, J., concurring).

As Chief Justice Rehnquist has said, "although punitive damages are 'quasi-criminal,' . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings." *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (citation omitted). "The Court has recognized that 'vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.'" *Bankers Life, supra*, at 88 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979). Here, Pacific Mutual was afforded literally no safeguards at all—no maximum limit on the fine, no sentencing guidelines, no recognition that its involvement in the "crime" was peripheral at best.

Nor was Pacific Mutual afforded the protection of Alabama's recently enacted legislative restrictions on punitive damages awards, which include a cap of $250,000, Alabama Code § 6-11-21 (Supp. 1988)) and limitations on liability of a principal for acts of an agent. Alabama Code § 6-11-27 (Supp. 1988). Either or both of these provisions could have limited substantially, if not eliminated, the liability of Pacific Mutual for punitive damages in this case. In effect, the jury here was cast adrift and invited to "do what they think is best." As several Justices of this Court have recognized, this type of standardless discretion may not withstand scrutiny under the Due Process Clause.

II. UNRESTRICTED PUNITIVE DAMAGES AWARDS THREATEN THE NATION'S EMPLOYMENT LAWS

A. Unlimited Punitive Damages Are Available in Employment-Related Claims Under Federal and State Law

The issue presented here, whether due process is violated by a standardless award of punitive damages, is of substantial importance to employers throughout the United States. Employers can be, and have been, held liable for punitive damages for causes of action arising out of the employment relationship on a number of grounds. 42 U.S.C. § 1981 prohibits racial discrimination in the "making and enforcement" of employment contracts, *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), and punitive damages are available. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Some states have adopted "fair employment practices" laws that substantially parallel the coverage of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Of these, a few provide expressly for punitive damages by statute. *See, e.g.*, New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 *et seq.*, as amended February 8, 1990, A.B. 2872). Others have been interpreted judicially to provide for punitive damages awards. *Grant v. Monsanto Co.*, 51 Fair Empl. Prac. Cases (BNA) 1593 (S.D. Ohio 1989) (compensatory and punitive damages available under Ohio Fair Employment Practice Law).

In addition, many states allow employees to pursue common law causes of action in tort arising out of incidents in the workplace. For instance, in addition to Title VII liability, a sexual harassment claim can give rise to a tort claim under state law for intentional infliction of emotional distress or even assault and battery, which in turn can lead to an award of punitive damages.[3] Also,

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[3] *See, e.g., Gilardi v. Schroeder*, 672 F. Supp. 1043 (N.D. Ill. 1986), *aff'd* 833 F.2d 1226 (7th Cir. 1987) ($12,960.50 in back pay

the traditional doctrine of employment-at-will has been eroded significantly in recent years through judicially-created exceptions such as "tort claims of wrongful discharge in violation of public policy, contract based claims of wrongful discharge in violation of an employer's policies, and a new tort of abusive or wrongful discharge." I. Shepard, P. Heylman, and R. Duston, *Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge* 17 (1989). Punitive damages are generally available under tort theories, and while contract claims do not usually support such a recovery, some states allow an award of punitive damages on a theory of "tortious or bad faith breach of contract." *Id.* at 212.

Moreover, Congress is now considering legislation that would amend Title VII to provide for compensatory and punitive damages. Section 8 of the Civil Rights Act of 1990 would give Title VII claimants the opportunity to collect punitive damages "if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the Federally protected rights of others . . . ." S. 2104/H.R. 4000, 101st Cong., 2d Sess. § 8 (1990). No further guidance is provided.

Except in the few states that have placed statutory caps on punitive damages awards, or the even fewer states that have barred punitive damages entirely,[4] juries

under Title VII and $50,000 in compensatory and $50,000 in punitive damages on state tort claims of battery and intentional infliction of emotional distress awarded to sexual harassment plaintiff).

[4] Respondents' brief in opposition to the Petition for Certiorari summarized state restrictions on punitive damages awards, concluding that "[n]ine states have enacted legislation capping punitive awards," *Respondents Brief In Opposition* at 20 (footnote with citations omitted), and that "Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington have abolished punitive damages except where explicitly authorized by statute." *Id.* at n. 35 (citations omitted).

are given virtually no guidance as to what amount of punitive damages might be appropriate.[5] Likewise, while the Circuit Courts of Appeals have adopted for Section 1981 cases the standard of "reckless or callous disregard for plaintiff's rights, as well as intentional violations of federal law" set by this Court in *Smith v. Wade*, 461 U.S. at 51, as appropriate to trigger a punitive damages awards in Section 1983 cases,[6] Section 1981 affords no guidance to a jury as to the appropriate size of an award.

Thus, employers are exposed on several fronts to unrestricted punitive damages awards of the type at issue in this case. In a claim arising out of the employment relationship, as in any other case, guidance to the jury to the effect that "you may take account of the character of the defendants, their financial standing, and the nature of their acts . . . is scarcely better than no guidance at all." *Browning-Ferris*, 109 S.Ct. 2909, 2923 (Brennan, J., concurring).

B. Punitive Damages Awards in the Employment Context Are "Skyrocketing"

There can be no question that punitive damages awards, particularly in the business context, are increasing by leaps and bounds. A 1987 RAND Study, *Punitive Damages: Empirical Findings*, reported massive increases in the number and size of punitive damages awards in busi-

[5] Respondents cite to state statutes offering procedural safeguards such as standards for judicial review of an award, mandatory or permissive bifurcations, limitations on admissibility of evidence of defendants' financial resources, and requirements for court approval before a complaint can demand punitive damages, but do not offer any such safeguards concerning the *size* of punitive damages awards. *Id.* at 21.

[6] *See, e.g., Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 109 S.Ct. 564 (1988); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir. 1987).

ness/contract cases, including employment claims, between 1960 and 1984.[7]

Recent awards in the employment field alone are staggering. A jury in Harris County, Texas District Court awarded $31,000,000 (reduced to approximately $21,000,000) to an accountant who claimed that his former employer wrongfully fired him after he refused to sign what he believed were fraudulent tax returns. *Sims v. Kaneb Services, Inc.*, No. 8602474 (Harris County, Texas District Court) (settled during pendency of motion for new trial). A former Xerox employee who claimed that the new job she was offered after her old position was discontinued was not what she had been promised won a jury award of $139,716 in compensatory damages and $8,750,000 punitive damages on a pendent state fraud claim, along with $145,000 back pay on an age discrimination claim. *Layman v. Xerox*, No. CA3-87-1733 (N.D. Tx., Dallas Div. 1990) (post-trial motions pending).

These and other exorbitant awards clearly bear "no . . . relation to the actual harm caused," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974),[8] and are "be[ing] employed to punish unpopular defendants." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42,

[7] M. Peterson, S. Sarma, M. Shanley, *Punitive Damages: Empirical Findings* at vi (1987). The study examined jury verdicts in Cook County, Illinois, and San Francisco, California, from 1960 to 1984 and other California jurisdictions from 1980 to 1984. It reports that the number of punitive damages awards in business/contract cases, which it defines to include employment-related cases, "doubled in Cook County and tripled in San Francisco County between the later 1970s and early 1980s." *Id.* The study also reported extraordinary growth in the size of such awards. "In the first *five* years of the late 1980s, juries in each jurisdiction awarded about three times the total awarded in the previous *ten* years." *Id.* at 24 (emphasis in original).

[8] In *Gertz v. Robert Welch, Inc.*, this court disallowed punitive damages in defamation suits by private citizens who cannot meet the "actual malice" test.

50 n. 14 (1979).[9] In each of these cases, the only rational explanation for the massive award is that the jury sought to punish a large employer by granting the plaintiff a windfall far in excess of actual damages.

Admittedly, federal courts generally have discretion to set aside an excessive jury verdict and order a new trial, or to order remittitur of a portion of the verdict that it finds to be excessive. *See generally* 6A Moore's Federal Practice ¶ 59.08[6] (2d ed. 1989).[10] Similar procedures are available in the states. *See, e.g.*, Ill. Rev. Stat. Ch. 110, para. 2-1207 (1988) (granting trial court statutory authority to order remittitur and conditional new trial in case of excessive jury award of punitive damages).

As the instant case exemplifies, however, this authority is not a guarantee, as the reviewing courts also are without adequate standards. Here, while conceding that it would likely have awarded less, the trial court denied Pacific Mutual's motion for remittitur. Pet. App. A14-A16. Even though the actual damages here were minimal, and in some cases nonexistent, the trial court concluded that the award was not "based upon bias, passion, corruption, or other improper motive," and must there-

[9] In *International Brotherhood of Electrical Workers v. Foust*, this Court held that "[punitive] damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance. Id. at 52.

[10] *See also Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503 (11th Cir. 1989) (upholding lower court's grant of judgment notwithstanding the verdict and in the alternative for a new trial on grounds, *inter alia*, that jury award of $2,500,000 in claim under 42 U.S.C. § 1981 was excessive); *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1314 (7th Cir. 1985) (granting new trial on issue of punitive damages in employment discrimination action under 42 U.S.C. § 1981 unless plaintiff agrees to remittitur from $150,000 to $20,000); *Rodgers v. Fisher Body Div., G.M.C.*, 739 F.2d 1102, 1109 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (reversing and remanding $500,000 punitive damages award under 42 U.S.C. § 1981 for new trial).

fore be allowed to stand. Pet. App. A15. The Supreme Court of Alabama affirmed, citing Alabama law which presumes jury verdicts to be correct and strengthening that presumption when a motion for new trial is refused by the trial judge. Pet. App. B13.

Accordingly, employers cannot always depend upon post-trial motions to keep jury awards within the bounds of reason. Thus, the absence of reasonable restrictions on jury awards of punitive damages, as shown by the instant case, raises serious concerns for EEAC's members.

C. The Absence of Reasonable Restrictions on Punitive Damages Awards Frustrates the Remedial and Conciliatory Policies Inherent in Federal Labor and Employment Law

Unrestricted punitive damages awards are particularly inappropriate because of the unique nature of employment disputes. Unlike typical tort and contract claims, employment controversies do not take place between strangers. The plaintiff and defendant in an automobile accident case generally never met before they collided. The parties to an ordinary breach of contract claim have no ties other than the contract itself. In contrast, most labor and employment disputes involve individuals and companies with an ongoing relationship that began before the dissension and is expected to continue after the parties' differences are resolved.

In keeping with this premise, the remedies provided by Congress to redress violations of federal labor and employment laws follow a consistent pattern. *See generally*, The Remedial Scheme of Existing Federal Employment Legislation, *An Assessment of Remedies: The Impact of Compensatory and Punitive Damages on Title VII*, National Foundation for the Study of Employment Policy (1990). The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-168, which prohibits discrimination against

employees involved in union activity, offers individual employees "make-whole" remedies that are designed to restore the injured party to the status he or she would have enjoyed had the violation not occurred. *See generally, NLRB v. J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969). These remedies include a cease and desist order, reinstatement and back pay, 29 U.S.C. § 160(c), but not compensatory or punitive damages. B. Schlei & P. Grossman, *Employment Discrimination Law* 1452 (2d ed. 1983). *See also Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938).

Title VII prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2. The provisions of Title VII which afford remedies to individuals were "expressly modeled on the backpay provision of the [NLRA]"[11] and thus provide make-whole remedies such as an injunction, reinstatement and back pay, but not compensatory or punitive damages.[12]

Like the NLRA, Title VII encourages conciliation and resolution rather than litigation.

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those

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[11] *Albermarle Paper Co. v. Moody*, 442 U.S. 405, 419 and n. 11 (1975) ("the framers of Title VII stated that they were using the NLRA provision as a model."). *See also* 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); *id.* at 7214 (Interpretative memorandum by Sens. Clark and Case). *Franks v. Bowman Transportation Company Inc.*, 424 U.S. 747, 769 (1976) (describing the NLRA as "the model" for Title VII remedies provision).

[12] *Shah v. Mt. Zion Hospital and Medical Center*, 642 F.2d 268 (9th Cir. 1981); *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977) (punitive damages not available under NLRA, on which Title VII was patterned); *Pearson v. Western Electric Company*, 542 F.2d 1150, 1152 (10th Cir. 1976) ("Title VII was not enacted to seek to punish the responsible party, but rather to compensate the victim of discrimination.").

> practices and devices that discriminate on the basis of race, color, religion, sex, or national origin . . . . *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.* To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation and persuasion before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added).

The availability of unrestricted punitive damages seriously hampers these conciliation efforts. Federal judges, who are ideally situated to observe the effects of different remedial schemes on the volume of litigation and the willingness of the parties before them to settle, have found general damages awards to be a serious impediment to conciliation and settlement in employment litigation.[13] As these judges have observed, the hope of a "big

[13] The potential effect on the conciliation process of the availability of an unquantified damages remedy was best expressed by courts that wrestled in the late 1970's and early 1980's with the issue of whether compensatory damages could be recovered under the Age Disrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, which authorizes the award of both "legal" and "equitable" relief. These courts agreed that the hope of such awards would "severely cripple the mediation process." *Dean v. American Security Insurance Company*, 559 F.2d 1036, 1039 n. 8 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). *See Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) ("Haggling over an appropriate sum could become a three-sided conflict among the employer, the [EEOC], and the claimant."); *Dean, supra*, at 1039 ("The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving [EEOC], employee and employer which might well be calculated to frustrate rather than to 'effectuate the purposes' of the Act."); *Johnson v.*

ticket" damages award at trial is a major disincentive to concilation.

While punitive damages generally are not available under Title VII, the Age Discrimination in Employment Act [14] and other federal labor and employment statutes,[15] plaintiffs frequently add pendent state claims to discrimination complaints under federal law. *Cf. United Mine*

Al Tech Specialties Steel Corp., 731 F.2d 143, 147 (2d Cir. 1984) ("If an individual alleging discrimination knew he could recover compensatory damages if he refused to settle during the administrative process and commenced a civil suit, he would have little incentive to resolve the dispute during the conciliation process."); *Sant v. Mack Trucks, Inc.*, 424 F. Supp. 621 (N.D. Cal. 1976) ("If large tort recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries.").

[14] The Age Discrimination In Employment Act does provide for "liquidated damages" in cases of "wilfull" violations, but these damages are strictly limited to an amount equal to the "unpaid compensation." 29 U.S.C. § 626(b). Moreover, a "willful" violation occurs only when the employer acts with "knowing or reckless disregard for whether or not the challenged conduct violated the Act." *Trans World Airlines v. Thurston*, 469 U.S. 111, 128 (1985).

[15] Although Section 1981, 42 U.S.C. § 1981, provides remedies including punitive damages for racial discrimination in the "making and enforcement" of employment contracts, *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), it should not be considered a "labor and employment law" in the same category as the NLRA and Title VII because, unlike those laws, it was not developed as such. Section 1981 was not used in any meaningful manner in the employment context until more than a hundred years after its enactment. In 1968, this court held for the first time that Section 1981 provided a right to an individual to sue for racial discrimination in *private* as well as public, sale or rental of property. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). It was not until 1975 that this court stated that Section 1981 affords a federal remedy against discrimination in private *employment* on the basis of race. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Thus, Section 1981 was not considered a labor or employment law when either the NLRA or Title VII was adopted.

Workers of America v. Gibbs, 383 U.S. 720 (1966) (doctrine of pendent jurisdiction). These state law claims often afford a punitive damages remedy where federal law does not. *See* discussion pp. 11-12, *supra*. The possibility of an unrestricted punitive damages award under state law thus has the same deleterious effect on conciliation efforts as would the availability of such an award under the federal statute itself.

D. Unrestricted Punitive Damages Awards Endanger the Ability of American Businesses To Manage the Workforce and Compete in the International Marketplace

Unrestricted punitive damages awards in the employment context can be expected to affect seriously the competitiveness of American businesses. A number of witnesses testifying before Congress in opposition to the proposal to add compensatory and punitive damages remedies to Title VII have warned of the bill's potential effect on American industry's ability to compete in the international marketplace. Both James C. Paras, testifying on behalf of the U.S. Chamber of Commerce, and Ralph H. Baxter, a San Francisco employment lawyer, agreed that expansion of Title VII remedies and the resultant increase in litigation would compel employers to retain marginal or unsatisfactory employees for fear that termination would result in costly litigation.[16] Mr. Paras

[16] Hearings on S. 2104, the Civil Rights Act of 1990, Before the Senate Labor and Human Resources Committee, 101st Cong., 2d Sess. (March 1, 1990) (statement of James C. Paras at 21); Hearings on H.R. 4000, the Civil Rights Act of 1990, before the House Education and Labor Committee and Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess. (March 13, 1990) (statement of Ralph H. Baxter, Jr. at 7). Indeed, a recent suprvey by tne AMS Foundation found that 42% of employers already feel that the potential for wrongful discharge litigation is a threat to management's ability to manage employees. Administrative Management Society Foundation, *1988-89 AMS Hiring & Firing Policies Survey* at 13 (1989).

also noted that "[b]y producing unreasonably large verdicts, [compensatory and punitive damages under Title VII] will increase the costs of goods and services, make the market less efficient, and reduce the availability of jobs." [17]

These arguments are no less applicable to the current availability of unrestricted punitive damages awards as they continue to climb. As Mr. Paras mentioned, when it decided in 1988 that compensatory and punitive damages should not be recovered in most wrongful discharge cases, the California Supreme Court stated, "the expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community.[18]

Unrestricted punitive damages awards, which continue to escalate, will soon reach the point where they threaten the competitiveness of American industries. Accordingly, EEAC's members are extremely concerned that such awards, which represent a windfall to plaintiffs far in excess of actual harm, will be permitted to continue unchecked unless this Court establishes standards requiring the punishment more realistically to fit the offense.

III. *RESPONDEAT SUPERIOR* IS NOT AN APPROPRIATE SOLE BASIS FOR LIABILITY FOR UNRESTRICTED PUNITIVE DAMAGES AWARDS AGAINST EMPLOYERS

A. Innocent Employers Would Be Extremely Vulnerable If Punitive Damages Could Be Imposed in Employment Cases Solely on the Basis of *Respondeat Superior*

The decision of the Alabama Supreme Court below gives employers further cause for concern because of the

[17] March 1, 1990 Senate Hearings, *supra note* 16 (statement of James C. Paras at 21).

[18] *Foley v. Interactive Data*, 47 Ca. 3d 654, 669 (1988).

manner in which it applied the doctrine of *respondeat superior* to hold Pacific Mutual liable for punitive damages for the acts of its agent. The court below approved and quoted at length the trial court's discussion of Alabama law, stating:

> "The Supreme Court of Alabama has repeatedly stated that a corporation is liable for the torts of its employees, both agent, and servant, based upon the principle of respondeat superior, not the doctrine of agency. 'The factual question to be determined is whether the act complained of was done either by agent or servant while acting within the course and scope of his employment; the corporation or principal may be liable in tort for the acts of its servants or agents done within the scope of employment, real or apparent, even though it did not authorize or ratify such acts or even expressly forbade them.'"

Pet. App. B7, quoting Pet. App. A7, *quoting Autrey v. Blue Cross and Blue Shield of Alabama*, 481 So. 2d 345 (Ala. 1985).

While the court below was dealing with the issue of intentional fraud rather than intentional discrimination in employment, its finding that the doctrine of *respondeat superior* can support an unrestricted jury award of punitive damages causes serious alarm among EEAC's members. Employers have been held responsible for the acts of their supervisory employees under Title VII, which defines "employer" as "a person engaged in an industry affecting commerce . . . and any agent of such a person . . .". 42 U.S.C. § 2000e(b).[19] While this Court has not directly ruled on the issue,[20] courts of appeals have held that *respondeat superior* applies to cases

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[19] *See, e.g., Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979).

[20] In *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982), this court assumed, but did not decide, that *respondeat superior* applies to § 1981 cases.

brought under 42 U.S.C. § 1981. *See, e.g., Vance v. Southern Bell Telephone and Telegraph Company*, 863 F.2d 1503 (11th Cir. 1989) (employer can be liable under Title VII or § 1981 through *respondeat superior* for harassing activities of co-worker if employer knew or should have known and failed to take remedial action); *Mitchell v. Keith*, 752 F.2d 385 (9th Cir.), *cert. denied sub nom. General Motors Corp. v. Mitchell*, 472 U.S. 1028 (1985) (liability under § 1981 can be imposed under doctrine of *respondeat superior* for the actions of a managerial employee, applying California law).

Under the theory espoused by the court below, employers would be extremely vulnerable to liability for punitive damages based upon the doctrine of *respondeat superior*, even though an employer had no reason to know of the unlawful conduct and certainly would not have condoned it if it had, and even if the employer had taken steps to prevent it. Few claims of intentional discrimination are the result of a vote of the corporate board of directors.

On the contrary, personnel decisions are usually made by an employee with supervisory authority, but at a level much below the Chief Executive Officer. Similarly, harassment claims normally originate from the offensive behavior of a supervisor, a co-employee or even a non-employee, not corporate management. Supervisory misconduct should not be the basis for punitive damage awards against an employer when the individual supervisor acts without authorization, where the misconduct is contrary to company policy, where the company had no way of knowing of the misconduct, where the misconduct is not condoned, or where the company acts to discipine the supervisor or provide an avenue of recourse to the victim.

B. Even If Punitive Damages Can Be Awarded in Employment Cases, This Court Should Adopt Standards That Credit Employer Efforts To Prevent Discrimination as Mitigating Factors

This Court previously has held, in the sexual harassment context, that employers cannot always be held strictly liable for the actions of supervisors. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). This rule is equally, if not more, relevant to liability for punitive damages. As Chief Justice Rehnquist has observed, punitive damages are rationalized as punishment, as deterrence, and as a "bounty" to encourage litigation. *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). Where an employer has made substantial efforts to prevent the harm complained of, none of these purposes is served by a punitive damages award against that employer.

Thus, standards are necessary to establish when, if ever, an employer may be liable for punitive damages based solely upon the doctrine of *respondeat superior*. While such standards are imperative now because employers may be vulnerable to punitive damages under state law, *see* discussion pp. 11-12, *supra*, they will be crucial if legislation is enacted to allow recovery of punitive damages under Title VII.

The sexual harassment context provides a particularly appropriate model for examination. Sexual harassment in the workplace can occur in two circumstances: "quid pro quo," where the offender is in a position of authority and ties acceptance of sexual advances to advancement or other economic benefits, and 'hostile environment," where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Vinson*, *supra*, at 65, quoting EEOC guidelines on sexual harassment, 29 C.F.R. § 1604.11(a)(3). The federal courts consistently have held employers strictly liable in cases of "quid pro quo" harassment by supervisory employees. *Vinson*, *supra*, at 72-73.

As noted above, however, this Court has refused to hold employers automatically liable in "hostile environment" cases where the offender is a supervisor, and thus presumably would not do so where such an environment was created by a co-employee. The Court suggested that factors such as (1) the existence of a specific policy prohibiting sexual harassment, (2) whether the policy is communicated to employees in a manner that encourages them to report harassing behavior, (3) whether and when the employer learned of the misconduct and (4) if the employer's response was adequate, might mitigate against a finding of liability. *Vinson*, *supra* at 72-75. Accordingly, federal courts since *Vinson* have based their decisions on these factors.[21] Thus, if an employer can demonstrate that it made a substantial effort to prevent the existence of a "hostile environment" it may be insulated from liability.

There may be situations, however, where an employer took reasonable steps to promote and implement an anti-harassment policy but was unsuccessful in preventing harassing behavior in a particular case. For example, a supervisor might ignore company policy and request sexual favors in exchange for a promotion recommendation. A co-employee with full knowledge of the company's policy could refuse to take it seriously and continue to tease another worker. If an employer is held strictly liable for "quid pro quo" harassment or falls short of the necessary proof to avoid "hostile environment" liability, the victim may be entitled to back pay

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[21] *See, e.g., Sventek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for "hostile envirenment" sexual harassment under Title VII when it took immediate action, including investigation and discipline, upon receipt of complaint); *Barrett v. Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984) (same).

and other equitable remedies currently available under Title VII.

It does not follow, however, that an employer should also be liable for punitive damages under these circumstances. Punitive damages are intended to punish wrongdoers and deter future unlawful conduct. If an employer has devoted substantial effort to implementing an anti-harassment policy but was unable to prevent the disobedience of an errant employee, it would serve no purpose to punish the employer. Thus, in cases where punitive damages are available, the employer's efforts should be considered as negating, or at least mitigating against, such an award. At the very least, the charge to the jury should direct the jury to take the employer's efforts into account.

For example, evidence that the employer has established a strong policy forbidding sexual harassment, has communicated that policy to supervisors and rank-and-file alike, and has indicated its intent to punish those who disobey, should be relevant to show that the company does not condone harassment. Thus, such evidence should distinguish and separate the company's liability from that of an individual supervisor or employee who in effect has engaged in willful misconduct. Indeed, imposing punitive damages against the employer in this situation would be nothing more than dipping into an innocent "deep pocket."

Likewise relevant is evidence that the company's policy encouraged employees to report incidents of harassment, including methods to bypass the direct supervisor if that person is also the harasser. An employee's failure to come forward to take advantage of the anti-harassment policy must then negate or mitigate against a punitive damages award. The plaintiff's refusal to make use of an available recourse that could have remedied the situation must be taken into consideration in mitigation of a punitive damages award.

In addition, where the affected employee does not make use of an anti-harassment policy and the employer has no reason to know that harassing behavior is occurring, the employer's lack of knowledge must also be considered a mitigating factor. In this situation, punitive damages are particularly inappropriate. Without actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect itself from actions contrary to company policy, even if it has a comprehensive anti-harassment policy. Punitive damages would serve no purpose, since there is no employer conduct to be depiored and deterred.

Finally, the conduct of an employer who *is* informed of harassing behavior is extremely relevant to mitigation of any punitive damages award. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough an bona fide investigation, reached a rational conclusion and took appropriate action, should be credited with those efforts. Indeed, the EEOC has strongly supported such actions. The agency's Guidelines take the position that employers who take "immediate and appropriate" corrective action are not liable for the acts of co-employees. 29 C.F.R. § 1604.11(d).

Morever, the agency has argued in litigation that statements made in the course of investigating a sexual harassment report should be accorded a qualified privilege in a defamation suit by an offending employee. *Brief of the Equal Employment Opportunity Commission as Amicus Curiae In Support Of Defendant's Motion For Summary Judgment, Stockley v. AT&T Information Systems, Inc.*, (No. 86 Civ. 1643 (RJD) E.D.N.Y.) [22]

[22] The court adopted the EEOC's position. *Stockley v. AT & T Information Systems, Inc.*, 687 F. Supp. 764, 769 (E.D.N.Y. 1988). *Accord DiSilva v. Polaroid Corp.*, No. 8828 (N.D. Mass. App. Div. January 4, 1985).

It also could be argued that an employer who conducts a complete investigation and reaches a well-supported, bona fide judgment that sexual harassment has not occured, and thus takes no action against the accused employee, should receive credit for its efforts even if a trier of fact later disagrees with its conclusion.

"Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Thus, as the purpose of punitive damages is to punish a wrongdoer and deter future unlawful conduct, it stands to reason that such awards should be severely limited, if not forbidden, when an employer made a good faith effort to prevent the unlawful conduct but was unable to do so. Accordingly, this Court should reject any *per se* rule that would allow a jury unrestricted discretion to award punitive damages solely on the basis of *respondeat superior*. Instead, if the Court finds that such awards are appropriate under any circumstances, it should adopt reasonable standards, including taking into account employer efforts to prevent unlawful behavior by subordinates as mitigating factors.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decision of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

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